

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHERYL ROBBINS BERG, as
Litigation Guardian ad Litem for
C.K.M.,

v. Plaintiff,

BETHEL SCHOOL DISTRICT,

Defendant.

CASE NO. C18-5345 BHS

AMENDED ORDER GRANTING
IN PART PLAINTIFF'S MOTION
FOR ATTORNEY FEES AND
COSTS

This matter comes before the Court on Plaintiff's motion for attorney fees and costs. Dkt. 164. The Court has considered the briefing filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion in part for the reasons stated herein.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff commenced this suit against Defendant Bethel School District in December 2016 in state superior court. Plaintiff initially asserted a claim of negligence arising out of the sexual abuse and harassment of C.K.M., a developmentally disabled student in the District, by another student, David M., during the 2012–2013 school year.

1 Plaintiff alleged that the District had prior knowledge of David M.’s dangerousness and
2 was negligent in supervising and protecting its students. Through discovery, Plaintiff
3 learned that the District and many of its employees had knowledge of David M.’s history
4 of abuse and continuing harassment of C.K.M. In 2018, Plaintiff amended her complaint
5 and added three additional causes of action against the District: violation of Washington’s
6 Law Against Discrimination (“WLAD”); violation of C.K.M.’s rights under the
7 Fourteenth Amendment as enforced by 42 U.S.C. § 1983; and violation of C.K.M.’s
8 rights under Title IX of the Education Amendments of 1972. Dkt. 1-2 at 12–18. The
9 District then removed the amended complaint to this Court. Dkt. 1.

10 After several years of litigation, extensive discovery, and complex dispositive
11 motions, *see, e.g.*, Dkts. 51, 65, 72, the case proceeded to trial on October 5, 2021, Dkt.
12 133. The jury considered whether the District violated C.K.M.’s rights under the Due
13 Process and Equal Protection Clauses as enforced by 42 U.S.C. § 1983, whether the
14 District violated C.K.M.’s rights under Title IX, whether the District violated WLAD,
15 and whether the District was negligent. Dkt. 99 at 2–3. On October 20, 2021, after eleven
16 days of trial, a jury reached a verdict finding in favor of Plaintiff on her § 1983 and
17 negligence claims and awarded her \$500,000. Dkts. 156, 160.

18 On November 2, 2021, Plaintiff timely moved for attorney fees and costs pursuant
19 to Federal Rule of Civil Procedure 54(d). Dkts. 164, 168, 169. On November 10, 2021,
20 the District filed a motion to compel, seeking Plaintiff’s fee agreements, original billing
21 records, and original invoices in order to properly respond to Plaintiff’s motion for
22 attorney fees, and requested that the Court continue Plaintiff’s motion for attorney fees to

1 allow it sufficient time to respond. Dkt. 171. The Court granted the District's motion to
 2 continue Plaintiff's motion for attorney fees pending resolution of the District's motion
 3 for judgment of dismissal as a matter of law, Dkt. 175, and the motion to compel, Dkt.
 4 171. Dkts. 174, 180. The Court denied the District's motion for judgment as a matter of
 5 law, Dkt. 183, and granted in part and denied in part its motion to compel, Dkt. 184.
 6 Plaintiff's motion for attorney fees and costs is now ripe for consideration.

7 **II. DISCUSSION**

8 Plaintiff seeks \$1,548,540 in fees, reflecting a 1.5 multiplier, \$60,754.93 for out-
 9 of-pocket costs, and \$17,340 in bringing the instant motion, inclusive of the motion and
 10 reply, as the prevailing party. Dkt. 164 at 13; Dkt. 193-1 at 7. The District opposes the
 11 requested amounts, arguing in part that Plaintiff should not be permitted to recoup fees
 12 for unsuccessful claims and that a lodestar multiplier is unwarranted. Dkt. 187.

13 Federal Rule of Civil Procedure 54(d)(1) allows for costs to be awarded to the
 14 prevailing party. "Rule 54(d) creates a presumption in favor of awarding costs to
 15 prevailing parties, and it is incumbent upon the losing party to demonstrate why the costs
 16 should not be awarded." *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999)
 17 (internal citation omitted). While there is a presumption in favor of awarding costs to the
 18 prevailing party, Rule 54(d) vests in the district court discretion to do so. *Assoc. of*
 19 *Mexican-American Educators v. California*, 231 F.3d 572, 591–92 (9th Cir. 2000).

20 The Civil Rights Attorney's Fees Awards Act of 1976 authorizes district courts to
 21 award reasonable attorney's fees to a "prevailing party." 42 U.S.C. § 1988(b). The Act
 22 reads in relevant part: "In any action or proceeding to enforce a provision of section[] . . .

1 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a
 2 reasonable attorney's fee as part of the costs." *Id.* In the Ninth Circuit, courts generally
 3 determine the permissible amount of attorneys' fees under § 1988 using the "lodestar"
 4 method. *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006); *Morales v. City of*
 5 *San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). After computing the lodestar figure, a
 6 district court "may then adjust the lodestar upward or downward based on a variety of
 7 factors." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013) (internal
 8 quotation and alterations omitted).

9 Preliminarily, the Court will not rule on Plaintiff's request for costs. *See* Dkt. 164
 10 at 13. Plaintiff seeks \$60,754.93 for costs in this motion and has also filed two motions
 11 for bill of costs requesting the same amount. *See* Dkt. 168 (seeking \$60,282.89 in costs);
 12 Dkt. 169 (seeking \$472.04 in costs). Under the Local Rules, Plaintiff's motions for bill of
 13 costs shall be considered by the Clerk of the Court. *See* W.D. Wash. LCR 54(d)(3). The
 14 Court thus defers to the Clerk of the Court's ruling on the motions for bill of costs.

15 Turning to Plaintiff's request for fees, Plaintiff argues that she is a prevailing party
 16 with unsuccessful but related claims and thus is entitled to recoup all hours expended by
 17 her counsel. Dkt 164 at 5–6. The proposed rates and hours for Plaintiff's counsel's work
 18 prior to filing the instant motion is as follows:

Attorney	Hourly Rate	Billable Hours	Fees
Thomas B. Vertetis	\$ 600.00	292.5	\$ 175,500.00
Loren A. Cochran	\$ 525.00	1,064.6	\$ 558,915.00
Christopher E. Love	\$ 450.00	17.3	\$ 7,785.00
Nicolas B. Douglas	\$ 400.00	478.3	\$ 191,320.00
William T. McClure	\$ 350.00	282.4	\$ 98,840.00
TOTAL		2135.1	\$ 1,032,360.00

1 *Id.* at 6. The total lodestar for the merits work is \$1,032,360.00.

2 The Court first considers whether Plaintiff's lodestar is reasonable. Under the
 3 lodestar method, a court determines how many hours were reasonably expended in the
 4 litigation and then multiplies those hours by a reasonable hourly rate. *See Moreno v. City*
 5 *of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). The District argues that Plaintiff
 6 should not be fully awarded her requested fees because Plaintiff overstaffed the case and
 7 her counsel's working hours were duplicative. Dkt. 187 at 6. It further argues that
 8 Plaintiff's counsel improperly block billed. *Id.* at 6–8. Finally, in a declaration of its
 9 counsel, the District asserts that Plaintiff's counsel's rates are unreasonable. *See* Dkt. 188.
 10 Plaintiff moves to strike the arguments raised for the first time in the declaration. Dkt.
 11 193-1 at 8–12.

12 The Local Rules prescribe that motions for attorney fees, which are noted in
 13 accordance with LCR 7(d)(3), and briefs in opposition shall not exceed twelve pages.
 14 W.D. Wash. LCR 7(e)(4). “Declarations, which are supposed to ‘set forth facts as would
 15 be admissible in evidence,’ should not be used to make an end-run around the page
 16 limitations of Rule 7 by including legal arguments outside of the briefs.” *King Cnty. v.*
 17 *Ramussen*, 299 F.3d 1077, 1082 (9th Cir. 2002). The District failed to raise its opposition
 18 to Plaintiff's counsel's rates in its response and improperly raised the argument in a
 19 declaration. The Court therefore GRANTS Plaintiff's motion to strike and will not
 20 consider the legal arguments found in the Declaration of Jerry Moberg. *See* Dkt. 188,
 21 ¶¶ 5, 6, 9–14, 18–23, 26–31. The Court will not consider any new legal arguments raised
 22 in any declaration.

1 But even if the Court considered the District’s arguments regarding Plaintiff’s
2 counsel’s rates, the Court concludes that their rates are reasonable. “[T]he established
3 standard when determining a reasonable hourly rate is the rate prevailing in the
4 community for similar work performed by attorneys of comparable skill, experience, and
5 reputation.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (internal
6 quotations omitted). Generally, “the relevant community is the forum in which the district
7 court sits.” *Id.* (citing *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)). The
8 requested rates—\$600 for Thomas B. Vertetis, \$525 for Loren A. Cochran, \$450 for
9 Christopher E. Love, \$400 for Nicolas B. Douglas, and \$350 for William T. McClure—
10 are comparable to attorneys in the Seattle-Tacoma area of similar skill, experience, and
11 reputation. *See Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1326–27 (W.D.
12 Wash. 2009) (finding attorney rates from \$475 to \$760 per hour to be reasonable rates).
13 Plaintiff also provides a survey of rates charged by Washington attorneys in 2015. *See*
14 Dkt. 164 at 7. Her counsel’s rates are within the average range from seven years ago,
15 further supporting the fact these rates are reasonable.

16 The Court additionally concludes that counsel expended a reasonable number of
17 hours. First, though the District argues that Plaintiff overstaffed the case by having four
18 attorneys in attendance at trial, the Court concludes that her staffing levels were
19 appropriate. The District does not explain how Plaintiff’s counsel’s hours were
20 duplicative, and the District itself staffed four attorneys. The Court also does not agree
21 with the District that Plaintiff’s counsel engaged in block billing. “Block billing is ‘the
22 time-keeping method by which each lawyer and legal assistant enters the total daily time

1 spent working on a case, rather than itemizing the time expended on specific tasks.””
 2 *Sierra Club v. BNSF Ry. Co.*, 276 F. Supp. 3d 1067, 1073 (W.D. Wash. 2017) (quoting
 3 *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007)). Courts do not
 4 require attorneys to “record in great detail how each minute of their time is spent on a
 5 case,” but, rather, need only “enough evidence to show that the effort expended during
 6 those hours was reasonable.” *McEuen v. Riverview Bancorp*, Inc., No. C12-5997 RJB,
 7 2014 WL 2197851, at *6 (W.D. Wash. May 27, 2014).

8 The time entries provided by Plaintiff’s counsel provide sufficient information for
 9 the Court to evaluate the reasonableness of the time expended. And upon review, the
 10 Court concludes that Plaintiff’s counsel reasonably expended their time in litigating this
 11 case over the course of nearly five years. This conclusion is further supported by the fact
 12 that the District’s counsel had billed 1,640.60 hours through October 1, 2021 and
 13 Plaintiff’s counsel had billed 1,366.7 hours. Dkt. 164 at 9.

14 Because Plaintiff’s counsel’s rates are reasonable and their hours are reasonable,
 15 the lodestar is reasonable and presumptively approved.

16 Although the Court has concluded that Plaintiff’s lodestar is reasonable, Plaintiff
 17 was only partially successful in her case. To determine fees in such a case under 42
 18 U.S.C. § 1988, a court must consider “(1) whether ‘the plaintiff fail[ed] to prevail on
 19 claims that were unrelated to the claims on which [she] succeeded,’ and (2) whether ‘the
 20 plaintiff achiev[ed] a level of success that makes the hours reasonably expended a
 21 satisfactory basis for making a fee award.’” *Watson v. Cnty. of Riverside*, 300 F.3d 1092,
 22 1096 (9th Cir. 2002) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

1 “Claims are *unrelated* if the successful and unsuccessful claims are distinctly
 2 different *both* legally *and* factually.” *Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005)
 3 (internal quotation and alteration omitted) (emphasis in original). But claims are related if
 4 “they involve a common core of facts *or* are based on related legal theories.” *Id.* (internal
 5 quotation omitted) (emphasis in original). Ultimately, the focus of the first inquiry is
 6 whether the successful and unsuccessful claims arose out of the same course of conduct.

7 *Id.*

8 The District argues that Plaintiff’s unsuccessful claims do not share any core facts
 9 or similar legal theories with her successful claims. Dkt. 187 at 5. The Court disagrees.
 10 First, her claims involve a common core of facts. All of Plaintiff’s claims arose from the
 11 sexual abuse and harassment C.K.M. suffered during the 2012–2013 school year while
 12 enrolled in the District. Though some of her claims were based on the District’s failure to
 13 apply its sexual harassment policy to her, and others were based on the District’s failure
 14 to protect her from David M.’s harassment, all of her claims arose out of the common
 15 core of facts concerning the abuse and the District’s inaction. Plaintiff’s claims also are
 16 based on related legal theories. Her unsuccessful Title IX claim, for example, alleged that
 17 the District was deliberately indifferent to the sexual abuse and harassment of C.K.M. by
 18 David M., while her successful Due Process claim asserted that the District violated her
 19 rights through a policy of inaction by failing to report David M.’s ongoing sexual
 20 harassment. *See* Dkt. 99 at 2–3. The legal theory of her claims all involved the District’s
 21 failure to protect, report, or stop David M.’s sexual harassment. Plaintiff’s claims had

1 both a common core of facts and involved related legal theories. Though not all of
 2 Plaintiff's claims were successful, they were undoubtedly interrelated.

3 Since Plaintiff's claims are related, the Court next evaluates "the significance of
 4 the overall relief obtained by the plaintiff in relation to the hours reasonably expended on
 5 the litigation." *Schwarz v. Sec. of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir.
 6 1995) (internal quotation omitted). "Where a plaintiff has obtained excellent results, [her]
 7 attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. A plaintiff
 8 may obtain excellent results without receiving all the relief requested. *See id.* at 435 n.11.
 9 On the other hand, if "a plaintiff has achieved only partial or limited success, the product
 10 of hours reasonably expended on the litigation as a whole times a reasonable hourly rate
 11 may be an excessive amount." *Id.* at 436.

12 Plaintiff achieved a good result; she succeeded on three of her five claims against
 13 the District at trial. The issues were novel and complex, and her counsel litigated the
 14 issues well. But Plaintiff only achieved a limited success in the entirety of the case. The
 15 Court dismissed all of her claims against the individual defendants and C.K.M.'s parents'
 16 claims. *See* Dkts. 51, 65. Though her success was good, the Court cannot say the results
 17 were excellent warranting a full compensatory fee. In exercising its discretion, the Court
 18 reduces Plaintiff's lodestar by 10% to \$929,124. *See Moreno*, 534 F.3d at 1112
 19 (explaining that a "district court can impose a small reduction, no greater than 10
 20 percent—a 'haircut'—based on its exercise of discretion and without a more specific
 21 explanation.").

1 For similar reasons, the Court declines to apply Plaintiff's requested 1.5 multiplier
 2 to the lodestar amount. *See* Dkt. 164 at 11–12. Once a court has determined the basic
 3 lodestar amount, a court may then adjust the lodestar upward or downward in rare and
 4 exceptional cases. *See Clark v. City of Los Angeles*, 803 F.2d 987, 991 (9th Cir. 1986). In
 5 considering whether to adjust the lodestar, the district court considers:

6 (1) the time and labor required; (2) the novelty and difficulty of the
 7 questions involved; (3) the skill requisite to perform the legal service
 8 properly; (4) the preclusion of other employment by the attorney due to
 9 acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or
 10 contingent; (7) time limitations imposed by the client or the circumstances;
 11 (8) the amount involved and the results obtained; (9) the experience,
 12 reputation, and ability of the attorneys; (10) the “undesirability” of the case;
 13 (11) the nature and length of the professional relationship with the client;
 14 and (12) awards in similar cases.

15 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69–70 (9th Cir. 1975), abrogated on other
 16 grounds by *City of Burlington v. Dague*, 505 U.S. 557 (1992).

17 As discussed above, the result was good but not exceptional to warrant a
 18 multiplier. The Court recognizes the novelty and difficulty in Plaintiff's claims and that,
 19 because of this difficulty, the case may be deemed “undesirable.” But this complexity and
 20 the quality of the representation is reflected in the lodestar, in the rates of Plaintiff's
 21 counsel, and in the time they had to expend to successfully litigate this case. The Court
 22 thus declines to award the requested multiplier here.

23 In sum, the Court concludes that Plaintiff is entitled to recover attorney fees for all
 24 of her claims but reduces the amount by 10% in exercising its discretion. Counsel
 25 properly staffed the case and expended a reasonable number of hours, and their rates
 26 were reasonable for the Seattle-Tacoma area. The Court awards Plaintiff the lodestar fees,

1 reduced by 10% to \$929,124, plus the fees associated with bringing the instant motion,
2 \$17,340.

3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that Plaintiff's motion for attorney fees and
5 costs, Dkt. 164, is **GRANTED in part**. Plaintiff is entitled to a fee award of \$946,464.00.

6 Dated this 19th day of May, 2022.

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9 BENJAMIN H. SETTLE
United States District Judge

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